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Nos. 96-405 and 96-5794

In the Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD G. KAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

EDWARD B. KALP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the admission in a criminal trial of numismatic certifications of coin grades violated either Federal Rule of Evidence 803(6) or the Confrontation Clause, where the evidence was introduced through the testimony of the director of the certification service instead of the coin graders themselves.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-405

RICHARD G. KAYNE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-5794

EDWARD B. KALP, PETITIONER

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. a7-a20) is reported at 90 F.3d 7.[1]

JURISDICTION

The judgment of the court of appeals (Pet. App. a6) was entered on July 24, 1996. The petition for a writ

[1] "Pet. App." refers to the appendix to No. 96-405.

of certiorari in No. 96-405 was filed on September 16, 1996, and the petition in No. 96-5794 was filed on September 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted on 15 counts of mail fraud, in violation of 18 U.S.C. 1341.[2] Petitioners were each sentenced to 36 months' imprisonment, to be followed by three years' probation, and were ordered to pay $339,466 in restitution. Pet. App. a2, a9. The court of appeals affirmed. *Id.* at a7-a20.

1. In the late 1970s, many new, inexperienced investors entered the market for rare coins. Pet. App. a9. The investment value of coins rests on their "grade," which is a numismatic measure of comparative wear on a 70-point scale. Small distinctions in grade can result in significant differences in value. Uncirculated, or "mint state" (MS), coins are given grades between 60 and 70. An MS65 grade coin can be worth ten times the price of an MS63 coin. *Id.* at a9-a10; Gov't C.A. Br. 4. For "certified" coins, a certification service sets the grade. Before 1986, the American Numismatic Association Certification Service (ANACS) was the only independent grading service in the nation. For "raw" uncertified coins, the value and grade may be established by collectors or numismatists. Pet. App. a10.

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[2] The government dismissed nine additional mail fraud counts, the trial court entered a judgment of acquittal on one count, and the jury acquitted petitioners on four other counts. Pet. App. a9.

Petitioners sought to capitalize on the booming market by selling purportedly rare coins, the grades and quality of which they misrepresented, to investors who had no expertise in the business. In July 1982, petitioners established the Rare Coin Galleries of America. Kalp served as the Galleries' President and resident numismatist, valuing coins for purchase from wholesalers and pricing them for resale. Kayne served as the Galleries' marketing director and was responsible for soliciting customers. The Galleries operated for four years and generated millions of dollars in revenue for petitioners. Pet. App. a9.

Petitioners solicited customers with literature that guaranteed that coins purchased from them "will be exactly as represented," and that the grades would "stand up to strict scrutiny at public auction or through direct sale." Gov't C.A. Br. 5. Petitioners provided purchasers with an "Unconditional Authenticity & Grading Guarantee" that represented that the coins were authentic and graded "according to the rigorous standards of the influential American Numismatic Association," which "provides unexcelled standards for qualitative ratings of coins." *Ibid.* The Guarantee also represented that, with proper handling, "the grade of your coins will *never* change between the time you buy them and the time you sell them." *Ibid.*

Contrary to these assurances, petitioners' representations to their customers that the coins they sold were of very high quality, accurately graded, and uncirculated were false. In fact, most of the coins petitioners sold had a much lower grade and value than represented. Petitioners claimed that most of the raw and certified coins that they offered were MS65 grade coins, when in reality the coins were of

MS63 value or less. Of the 287 coins marketed as MS65 grade, only seven were actually of that quality. Gov't C.A. Br. 6; Pet. App. a10, a18. Seventeen victims testified that they had paid a total of $890,750 for coins that were worth only $90,249. Gov't C.A. Br. 6-7.

2. In January 1991, petitioners were indicted on 29 counts of mail fraud. Pet. App. a11. At trial, eight coin dealers testified that the coins petitioners sold were of substantially lower quality and value than represented. *Id.* at a13. Several customers also testified that sales of their coins garnered significantly less than their purchase prices. *Id.* at a15. In addition, the government sought to introduce the certificates of value that ANACS had assigned to the coins sold to two of petitioners' customers. Although the ANACS graders were not identified or made available for cross-examination, Richard Montgomery, ANACS' director from 1980 to 1987, testified regarding the qualifications of the graders and the established procedures for grading coins and preparing certificates.[3] Montgomery testified that ANACS prepared and kept the coin grading certificates as part of its regular business practice. *Id.* at a16-a17; Tr. 4-52 to 4-57 (Sept. 23, 1993). At the close of the government's case, the court allowed the ANACS certificates of two customers to be read to the jury. Pet. App. a16.[4]

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[3] Montgomery testified that at least three persons graded each coin and that the final grade assigned reflected their consensus. Tr. 4-54 (Sept. 23, 1993).

[4] Earlier, the judge had allowed one customer to read his certificates to the jury, but the next day the court struck that testimony. Those certificates were read to the jury again at the close of the government's case. Pet. App. a16. The certificates themselves were not admitted as evidence.

3. Petitioners appealed, arguing that the trial court abused its discretion and violated their Sixth Amendment confrontation rights in admitting the ANACS certificates. The court of appeals affirmed. Pet. App. a7-a20. First, the court held that a proper foundation had been laid for admission of the certificates as business records under Federal Rule of Evidence 803(6), because the ANACS director had "adequately established the genesis of the records and their subsequent custody." Pet. App. a16. The court also rejected petitioners' argument that the "source of information or the method or circumstances of preparation indicate lack of trustworthiness." The court of appeals noted that the district judge had allowed the defense substantial leeway in attacking the reliability of the ANACS certificates, so that the jury had sufficient information on which to evaluate their reliability. *Id.* at a16-a17.

The court of appeals likewise rejected petitioners' Sixth Amendment Confrontation Clause claim. Relying on *United States* v. *Inadi*, 475 U.S. 387 (1986), the court held that the certificates could be admitted without a prior showing of the ANACS graders' unavailability. Because the certificates fell within a "firmly rooted hearsay exception," the Confrontation Clause's concern for trustworthiness and reliability was satisfied. Pet. App. a17-a18.[5]

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[5] Petitioners also raised double jeopardy, insufficiency of the evidence, and ineffective assistance of counsel claims, along with other evidentiary objections. The court of appeals rejected each of those arguments, and petitioners do not renew them here. Pet. App. a11-a15, a18-a20.

ARGUMENT

Petitioners contend (96-405 Pet. 6-15; 96-5794 Pet. 7-16) that the district court's admission of the ANACS certificates violated Federal Rule of Evidence 803(6) and the Confrontation Clause, and conflicts with the decisions of other courts. Their fact-specific claims, which focus on the precise nature of the ANACS certificates, were correctly rejected by the court of appeals and do not warrant this Court's review.

1. Rule 803(6), commonly known as the business records exception to the hearsay rule, provides that a report of opinions or diagnoses is not excluded by the hearsay rule if: (1) the report was made at or near the time that the opinions or diagnoses occurred; (2) the report was made by a person with knowledge of the subject of the report; (3) the report was made in the course of a regularly conducted business activity; and (4) the regular practice of the business is to make such reports.[6]

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[6] Federal Rule of Evidence 803(6) provides that the following records are not excluded by the hearsay rule:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupa-

Those requirements were met in this case: The ANACS director at the time the certificates were issued testified about ANACS' regular practice of receiving, grading, and contemporaneously issuing certificates for coins; the training requirements for employees; and the routine character of the grading process. Tr. 4-53 to 4-58, 4-93 to 4-94 (Sept. 23, 1993). That testimony provided a proper foundation for admission of the evidence under Rule 803(6). *United States* v. *Cestnik*, 36 F.3d 904, 910 (10th Cir. 1994), cert. denied, 115 S. Ct. 1156 (1995); *United States* v. *Bland*, 961 F.2d 123, 127 (9th Cir.), cert. denied, 506 U.S. 858 (1992); *United States* v. *Franks*, 939 F.2d 600, 602-603 (8th Cir. 1991).

a. Petitioners contend (96-405 Pet. 7-9, 14; 96-5794 Pet. 13-14) that the district court abused its discretion in admitting the certificates because they do not reflect scientific or "mechanically objective" tests. Petitioners' argument is flawed in numerous respects. First, Rule 803(6)'s text covers "opinions[] or diagnoses," and not just mechanically objective descriptions of act or events. Indeed, the Advisory Committee Notes expressly recognize the Rule's application to opinions such as "medical diagnoses, prognoses, and test results," even though those are matters of opinion that go beyond objective facts. Fed. R. Evid. 803(6) advisory committee's notes (1972 Proposed Rules). See, *e.g.*, *Reardon* v. *Manson*, 806 F.2d 39, 41 (2d Cir. 1986) (both subjective and objective findings in report admitted), cert. denied, 481 U.S. 1020 (1987).

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tion, and calling of every kind, whether or not conducted for profit.

Second, courts have focused on the mechanical and scientific nature of business records in some cases, not to limit the exception's usual application, but to permit the introduction of routine and objective records maintained by law enforcement personnel that otherwise might be inadmissible under the public records hearsay exception, Fed. R. Evid. 803(8). See, *e.g.*, *Sherman* v. *Scott*, 62 F.3d 136, 140-142 & n.4 (5th Cir. 1995), cert. denied, 116 S. Ct. 816, 1279 (1996); *Minner* v. *Kerby*, 30 F.3d 1311, 1314-1315 (10th Cir. 1994); cf. *United States* v. *Rosa*, 11 F.3d 315, 332-333 (2d Cir. 1993) (confining Rule 803(8)'s limitation on investigatory reports to reports produced in an adversarial context; court permits routine, objective, scientific medical examiner reports to be admitted as evidence), cert. denied, 114 S. Ct. 1565, 1864 (1994); *Manocchio* v. *Moran*, 919 F.2d 770, 775, 776-779 (1st Cir. 1990), cert. denied, 500 U.S. 910 (1991).[7] Rule 803(8)'s restriction on the admission of records of "law enforcement personnel" has no application to the certificates produced by ANACS graders, which are admissible as business records under Rule 803(6).

Third, as described by Richard Montgomery, ANACS' former director, ANACS' standards for grading coins were fairly routinized. Tr. 4-58 to 4-59, 4-70 to 4-79, 4-93 to 4-94 (Sept. 23, 1993). The potential for variation was further reduced by the fact that ANACS required three graders to reach a consensus

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[7] *United States* v. *Baker*, 855 F.2d 1353 (8th Cir. 1988), cert. denied, 490 U.S. 1069 (1989), likewise involved the attempted admission under Rule 803(6) of laboratory reports created by a police department. 855 F.2d at 1359-1360; see also *United States* v. *Roulette*, 75 F.3d 418, 422 (8th Cir.), cert. denied, 117 S. Ct. 147 (1996).

grade for each coin. *Id.* at 4-54. Petitioner Kalp himself testified that ANACS consistently gave a fair opinion of the worth of coins and that the graders were "extremely accurate in their grading." Gov't C.A. Br. 32. Thus, the grading process employed by ANACS was sufficiently standardized and objective to satisfy even petitioners' gloss on the business records exception. Cf. *United States* v. *Kail*, 804 F.2d 441, 445, 447 (8th Cir. 1986) (arguments about evidentiary reliability of ANACS grades not well-founded where defendants themselves had relied on those standards and a pattern of overvaluation was demonstrated).

b. Petitioners also err in arguing (96-405 Pet. 10; 96-5794 Pet. 9-12) that the admission of the certificates violated the requirements for expert testimony established by Federal Rules of Evidence 702 and 705. First, petitioners did not raise this argument below. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).

Second, the admission of the information in the grading certificates was consistent with the rules governing the admission of expert testimony. With respect to those evidentiary challenges petitioners actually did raise regarding expert testimony on coin values, the court of appeals ruled that

> the record reveals that the experts were experienced, the chains of custody of the coins were carefully established, the experts' methods were explained, and the appraisals were reasonably current. Thorough cross-examination was permitted

> on all of the issues, such as subjective judgments and variable markets, which might impeach the expert testimony.

Pet. App. a14-a15.

Third, Rule 803(6) contains no special limit or conditions on the admission of business record evidence just because the subject matter may reflect the preparer's professional expertise. If such a limit were adopted, it would apply to many business records, including medical reports, that the drafters of the Rule intended to be admitted, without producing the actual preparer of the document. See Fed. R. Evid. advisory committee's notes (1974 Enactment) (Rule 803(6) "is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the [document] was based. * * * The committee believes this represents the desired rule in light of the complex nature of modern business organizations."); *ibid.* (1972 Proposed Rules); see *Franks*, 939 F.2d at 602; *United States* v. *Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990), cert. denied, 498 U.S. 1124 (1991); *United States* v. *Franco*, 874 F.2d 1136, 1139-1140 (7th Cir. 1989); accord *Manocchio*, 919 F.2d at 778 n.15.[8]

Petitioners contend (96-405 Pet. 10-11; 96-5794 Pet. 9) that the district court's failure to incorporate re-

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[8] Petitioner Kayne's attempt (Pet. 6) to analogize grading certificates to the autopsy report at issue in *Manocchio* must fail. The First Circuit took the autopsy report outside the business records exception not because it contained opinions, but because it contained legal conclusions (*i.e.*, cause of death as "homicide") and third-party hearsay. 919 F.2d at 776. Neither of those considerations applies here.

strictions on expert testimony into Rule 803(6) conflicts with the Ninth Circuit's decision in *Waddell* v. *Commissioner*, 841 F.2d 264 (1988). *Waddell* did uphold the exclusion under Rule 803(6) of an appraisal of an electrocardiogram terminal, but the appraisal was not excluded because of a failure to satisfy limitations on expert testimony. Rather, the court excluded the appraisal because there was "no evidence" that the appraisal either was prepared or was obtained in the regular course of business. 841 F.2d at 267. The court of appeals, moreover, ruled only that exclusion of the evidence fell within the district court's broad discretion. It specifically did not rule that exclusion of such records is mandatory. *Ibid.*[9]

2. Petitioners also argue that admission of the contents of the grading certificates violated the Confrontation Clause. Hearsay evidence may be admitted without violating the Confrontation Clause as long as it bears adequate indicia of reliability. *Idaho* v. *Wright*, 497 U.S. 805, 814-815 (1990). When the evidence falls within a "firmly rooted" hearsay exception, no further showing of reliability is required. *Id.* at 815-816. This Court has indicated that the business records exception is such a firmly rooted excep-

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[9] Petitioner Kayne's reliance (Pet. 11-12) on the D.C. Circuit's decisions in *Washington Coca-Cola Bottling Works* v. *Tawney*, 233 F.2d 353 (1956), and *Lyles* v. *United States*, 254 F.2d 725, 731 (1957), cert. denied, 356 U.S. 961 (1958), 362 U.S. 943 (1960) and 368 U.S. 992 (1962), is misplaced. Those cases interpreted an evidentiary rule that predated the Federal Rules of Evidence and that contained a limitation on the admission of opinions that the current Rule 803(6) expressly abandoned. See Fed. R. Evid. 803(6) advisory committee's notes (1972 Proposed Rules) (expressly rejecting *Lyles*).

tion. See *Ohio* v. *Roberts*, 448 U.S. 56, 66 n.8 (1980) ("Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions.") (citation omitted); see also *Dutton* v. *Evans*, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring in the result). The courts of appeals have consistently rejected Confrontation Clause challenges to the admission of reports under the business records exception to the hearsay rule. *Sherman*, 62 F.3d at 140-142; *United States* v. *Ross*, 33 F.3d 1507, 1516-1517 (11th Cir. 1994), cert. denied, 115 S. Ct. 2558 (1995); *Minner*, 30 F.3d at 1314-1315; *Ray*, 930 F.2d at 1371; *Manocchio*, 919 F.2d at 773-781; *United States* v. *Baker*, 855 F.2d 1353, 1360 (8th Cir. 1988), cert. denied, 490 U.S. 1069 (1989); *Reardon*, 806 F.2d at 41-43.

The district court did not first need to find that the graders were unavailable to testify. See *White* v. *Illinois*, 502 U.S. 346, 357 (1992) (rejecting unavailability rule for hearsay statements admitted as spontaneous declarations and statements made for medical treatment); *Inadi*, 475 U.S. at 394 (same, for statements admitted as co-conspirator declarations). In those cases, the Court explained that an unavailability rule for the hearsay exceptions at issue would deprive the factfinder of useful evidence, would be unlikely to add to the truth-seeking process, and would impose substantial burdens on the trial process. See *White*, 502 U.S. at 355-357; *Inadi*, 475 U.S. at 395-399. The same reasons require the rejection of an unavailability requirement for the firmly rooted business records exception.

Petitioners' suggestion (96-405 Pet. 10; 96-5794 Pet. 8-9) that the district court's ruling conflicts with *United States* v. *McClintock*, 748 F.2d 1278 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985), is mistaken.

The Ninth Circuit's holding that the admission of gemstone appraisals violated the Confrontation Clause was predicated upon a reading of *Ohio* v. *Roberts*, *supra*, that required the government to demonstrate the unavailability of the preparer of the report. *McClintock*, 748 F.2d at 1292 (following *Roberts*, but noting "closeness of this issue"). That expansive reading of *Roberts* has since been disavowed by this Court, *White*, 502 U.S. at 357; *Inadi*, 475 U.S. at 394, and abandoned by the Ninth Circuit, *Guam* v. *Ignacio*, 10 F.3d 608, 611 n.1 (9th Cir. 1993).[10]

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[10] The other cases cited by petitioners are equally inapposite. *United States* v. *Williams*, 447 F.2d 1285 (5th Cir. 1971), cert. denied, 405 U.S. 954 (1972), suggests an unavailability requirement that this Court and the Fifth Circuit have since renounced. See *Sherman*, 62 F.3d at 140. *United States* v. *Tran Trong Cuong*, 18 F.3d 1132 (4th Cir. 1994), struck a physician's testimony because he impermissibly bolstered it by reference to an absent doctor's report, without demonstrating that the report was the type of information that a testifying doctor would rely on under Federal Rule of Evidence 703. That case does not speak to the scope of Rule 803(6). *United States* v. *Lawson*, 653 F.2d 299 (7th Cir. 1981), cert. denied, 454 U.S. 1150 (1982), concerned an expert witness's attempt to testify simply by summarizing the out-of-court statements made by others. Here, by contrast, the grading certificates were admitted by a proper custodian as business records. Finally, *United States* v. *Kail*, 804 F.2d 441 (8th Cir. 1986), held only that the government's failure to produce coins that were in the possession of the defendant does not violate the Confrontation Clause. While the court of appeals noted that the opportunity to cross-examine the preparer of grading certificates obviated Confrontation Clause concerns in that case, it did not hold or suggest that this was the exclusive means of avoiding a Sixth Amendment violation. Nor did the court have any occasion to discuss the impact of *Inadi* on the Confrontation Clause analysis.

3. Finally, any error in the admission of the grading certificates was, in any event, harmless in this case. See, *e.g.*, *McClintock*, 748 F.2d at 1291 n.9, 1292 n.10 (admission of gemstone appraisals subject to harmless error analysis). Petitioners extensively cross-examined Richard Montgomery regarding the alleged subjectivity of the coin grading process and the possibility for disagreements between different graders. Tr. 4-59 to 4-93, 4-95 (Sept. 23, 1993); see also Pet. App. a16-a17 (district court "allowed the defense to conduct liberal (if not excessive) inquiry into the unreliability of the ANACS certificates"). There is no reason to believe that cross-examination of the graders would have added any useful information, because they in all likelihood would have had no recollection of the specific grading job at issue. See *United States* v. *McCormick*, 54 F.3d 214, 222 (5th Cir.) ("[T]he technicians would not have remembered what they did with [the defendant's] specimens and therefore would have described their normal procedures, and the judge would not have been enlightened." (quoting *United States* v. *Pierre*, 47 F.3d 241, 243 (7th Cir. 1995))), cert. denied, 116 S. Ct. 264 (1995); *Reardon*, 806 F.2d at 41.

Furthermore, the only count to which the ANACS grading certificates pertained was Count 8. See Pet. App. a15. As to that count, the victim, Anthony Scapicchio, testified that petitioners charged him $200,000 for coins that he later was able to sell for only $14,000. Gov't C.A. Br. 33. Moreover, the other evidence that petitioners exaggerated the grades of the coins they sold was overwhelming. Eight coin dealers testified at trial that petitioners had overgraded their coins. Pet. App. a13. Also, several of

petitioners' employees testified that the company's coins were routinely upgraded. *Id.* at a18.[11]

Lastly, petitioner Kalp's own testimony undercut the potential value of any additional cross-examination. Kalp testified that ANACS consistently gave a fair opinion of the worth of coins and that the graders were "extremely accurate in their grading." Gov't C.A. Br. 32; see also *id.* at 5 (petitioners' advertising literature announced that their coins were graded "according to the rigorous standards of the influential American Numismatic Association," which "provides unexcelled standards for qualitative ratings of coins"). There is no reason to believe that the jury would have been influenced by cross-examination intended to demonstrate the opposite proposition.

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[11] For instance, one employee testified that he helped Kalp remove an MS63 designation and, at Kalp's instruction, replaced it with an MS65 grade. Another employee saw Kalp purchase coins at the MS60 or MS63 level, which were then marked for sale as MS65 coins. Kalp also purchased rolls of low-quality Morgan dollars, which he resold as MS65s. Gov't C.A. Br. 12. Similarly, Kayne instructed an office employee to change the grade on an independent, third-party's grading certificate from a lower number to MS65, ignoring the employee's protests that the alteration would be illegal. *Id.* at 15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1996